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CV 03-1252 #1

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

THEODORE C. SWARTZ, Plaintiff, KPMG, LLP, PRESIDIO GROWTH, LLC, PRESIDIO ADVISORY SERVICES, INC., HAYES STREET MANAGEMENT, INC., NORWOOD HOLDINGS, INC, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC., SIDLEY AUSTIN BROWN & WOOD, LLP, DALE R BAUMANN, JOHN M LARSON, ROBERT A PFAFF, DAVID AMIR MAKOV, STEVEN BUSS, and R. J RUBLE, and their respective marital communities, if any Defendants	Case No. C03-1252P COMPLAINT FOR (1) VIOLATION OF RICO, 18 U.S C 1962 *et seq.*, (2) VIOLATION OF WASHINGTON CONSUMER PROTECTION/UNFAIR BUSINESS PRACTICES ACT, RCW 18 86 *et seq* , (3) FRAUD, (4) BREACH OF CONTRACT; (5) PROFESSIONAL NEGLIGENCE, (6) BREACH OF FIDUCIARY DUTY, (7) CONSPIRACY

no summons issued; # 850425

Plaintiff Theodore C. Swartz alleges as follows

JURISDICTION AND VENUE

1 This is an action for damages arising in part out of defendants' violations of Sections 1962(c) and 1962(d) of the Racketeer Influenced and Corrupt Organizations Act of 1970 (18 U S.C 1961 *et* seq) (RICO), fraud, conspiracy, negligence, breach of

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contract, and violation of Washington Consumer Protection/Unfair Business Practices Act, RCW 19 86 *et seq.*

2 This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C § 1331 because the RICO claim raises a question of federal law; and pursuant to 28 U.S.C. § 1367 because the remaining state law claims are so related to the RICO claim that they form part of the same case or controversy

3 Venue is proper in this District pursuant to 28 U S C § 1965(a) because the defendants are all found, reside and/or transact affairs in this District, pursuant to 18 U.S.C § 1965(b) because the ends of justice require that the parties residing in any other district be brought before this Court; pursuant to 28 U S C § 1291(b) because a substantial part of the events or omissions giving rise to this action occurred in this District; and/or pursuant to 28 U S.C. § 1391(b) because one or more of the defendants is found in and is subject to personal jurisdiction in this District

PARTIES

4 Plaintiff Theodore Swartz ("Swartz") is a United States citizen who resides in Seattle, King County, Washington 98101

5. Defendant KPMG is an international accounting and consulting firm known as one of the "Big Four" accounting firms in the United States KPMG is organized in Delaware and maintains its headquarters in New York KPMG does business on a routine basis in, and may be found in, the U S. Western District of Washington and is subject to the general jurisdiction of this Court KPMG acted as promoter of the fraudulent transaction (known as a "BLIPS" transaction) that forms the basis for the claims alleged herein

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6. On information and belief, Defendant Dale R Baumann ("Baumann") is a partner of KPMG, in its Mountain View, California office, and is a federally authorized tax practitioner On information and belief, defendant Baumann is a citizen of California and is a certified public accountant licensed by the State of California Baumann acted as a promoter of the BLIPS transaction and in so doing Baumann directed communication into the U S Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over his person by this Court Collectively, Baumann and KPMG are referred to herein as the "KPMG Defendants "

7 Defendant Presidio Growth, LLC ("Presidio Growth") is a Delaware limited liability company formed on July 16, 1999 The address of Presidio Growth is 333 Hayes St, Ste. 200, San Francisco, CA 94102. Presidio Growth is a registered investment advisor under the Registered Investment Advisors Act of 1940. On information and belief, its Principals are John Larson, Robert Pfaff and D Amir Makov. Ownership in Presidio Growth is held by Hayes Street Management Services, Inc (70% ownership) and by Norwood Holdings, Inc (30% ownership). Presidio Growth and its members acted as promoters of the BLIPS transaction and in so doing Presidio Growth and its members directed communication into the U S. Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over their persons by this Court

8. Defendant Presidio Advisory Services, Inc. ("Presidio Advisory Services") is a Manager of Presidio Growth LLC Presidio Advisory Services' president is Steven Buss and

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its managing directors are John Larson, D. Amir Makov, Robert Pfaff Presidio Advisory Services and its members acted as promoters of the BLIPS transaction and in so doing Presidio Advisory Services and its members directed communication into the U.S. Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over their persons by this Court

9 On information and belief, at all relevant times defendant John M Larson ("Larson") was President and Managing Director of Presidio Growth, President and Managing Director of Presidio Advisory Services, and Managing Director of Presidio Advisors. Prior to his association with these entities, from January 1985 to September 1997, Larson had been employed by KPMG On information and belief, John Larson is a federally authorized tax practitioner and a Certified Public Accountant John Larson acted as a promoter of the BLIPS transaction and in so doing Larson directed communication into the U S Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over his person by this Court

10. On information and belief, at all relevant times defendant Robert A. Pfaff ("Pfaff") was Treasurer and Managing Director of Presidio Growth, Treasurer and Managing Director of Presidio Advisory Services, and was Managing Director of Presidio Advisors LLC Prior to his association with these entities, from March 1977 to September 1997, Pfaff was employed by KPMG On information and belief, Robert Pfaff is a federally authorized tax practitioner and a Certified Public Accountant Robert Pfaff acted as a promoter of the BLIPS

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transaction and in so doing Pfaff directed communication into the U S Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over his person by this Court

11. On information and belief, at all relevant times defendant David Amir Makov ("Makov") was Secretary and Managing Director of Presidio Growth LLC and Secretary and Managing Director of Presidio Advisory Services, Inc David Amir Makov acted as a promoter of the BLIPS transaction and in so doing Makov directed communication into the U.S. Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over his person by this Court

12 Hayes Street Management, Inc is a Member of Presidio Growth LLC, owning a 70% interest in Presidio Growth, LLC.

13 Norwood Holdings, Inc is a Member of Presidio Growth LLC, owning a 30% interest in Presidio Growth, LLC

14. On information and belief, Defendant Steven Buss at all relevant times was the Managing Director of Presidio Advisory Services On November 30, 1999, Steven Buss and another person entered into a "Power of Attorney" or "Trading Authorization Limited to Purchases and Sales of Securities and Sales of Securities and Investment of Monies" agreement with Swartz

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15. Collectively, Presidio Growth, Presidio Advisory Services, Larson, Pfaff, Makov, Buss, Hayes Street Management, Inc , and Norwood Holdings, Inc are referred to herein as the "Presidio Defendants "

16. Defendant Deutsche Bank AG is a corporation organized under the laws of the Federal Republic of Germany On in formation and belief, defendant Deutsche Bank Securities, Inc. is a subsidiary of Deutsche Bank AG organized under the laws of the United States and one or more states Deutsche Bank's principal place of business is in Germany, however, it has branches all over the world including New York and the Cayman Islands

17. Defendants Deutsche Bank AG/Cayman Islands Branch and Deutsche Bank Securities/New York Branch provided Swartz with a line of credit of $33 3 million and a premium in the amount of $20 million for a total of $53 million on September 30, 1999. On October 12, 1999, Deutsche Bank AG and Deutsche Bank Securities approved the assignment of the credit agreement to Longs Strategic Investment Fund, LLC Deutsche Bank AG and Deutsche Bank Securities, Inc acted as promoters of the BLIPS transaction and in so doing they directed communication into the U S Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over their persons by this Court Collectively, defendants Deutsche Bank and Deutsche Bank Securities are referred to herein as the "Deutsche Bank Defendants "

18. On information and belief, Defendant Sidley Austin Brown & Wood LLP is one of the nation's largest law firms, with over 1,400 attorneys and offices in New York, New York, Los Angeles and San Francisco, California, Chicago, Illinois, Dallas, Texas,

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Washington, D.C , and London, England. On information and belief, Sidley Austin Brown & Wood is a limited liability partnership organized in Delaware and is the successor in interest to Brown & Wood, the law firm that advised Swartz, and thus it is referred to herein as "Brown & Wood " Brown & Wood at all relevant times directed communication into the U S. Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over its persons by this Court

19 On information and belief, Defendant R J Ruble ("Ruble") is an attorney licensed to practice law in the State of New York, a partner in Sidley Austin Brown & Wood's New York office, is a member of Sidley Austin Brown & Wood LLP's Executive Committee, and is a citizen of New York Ruble directed communication into the U.S. Western District of Washington and otherwise conducted business therein sufficient to establish minimum contacts within the forum that support the exercise of jurisdiction over its persons by this Court Collectively, Brown & Wood and Ruble are referred to herein as the "Brown & Wood Defendants "

20 On information and belief, the defendants engaged in a large number of BLIPS transactions and similarly fraudulent transactions and, in doing so, acted in concert according to a prearranged and commonly understood and accepted plan or scheme. In so doing, the defendants were acting mutually and as the agents of one another.

SUMMARY OF FACTS AND CLAIMS

21 In 1999, Swartz realized substantial capital gains of about $18 million from the sale of his business on which he fully expected to pay federal taxes Swartz took no

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affirmative steps to find ways to shelter these extraordinary capital gains from taxation KPMG used its prior knowledge of Swartz' finances and approached Swartz, telling him that KPMG had on its shelf a strategy to reduce or eliminate his taxes This advice by KPMG and some of the other Defendants has proved disastrous for Swartz, who paid millions of dollars to its professional advisers only to receive erroneous and incompetent advice that has exposed Swartz to audits by the IRS and substantial tax liability, including interest and penalties, and prevented Swartz from availing himself of legitimate tax savings opportunities.

22. KPMG lured Swartz into the scheme (a) promising him that he would not have to pay capital gains tax on the over $18-million profit he had realized as a result of the sale of his business and (b) promising him that he would procure, through pre-arrangement, an "opinion letter" attesting to the legitimacy of BLIPS from Brown & Wood Swartz paid these Defendants hundreds of thousands of dollars, and on information and belief, these Defendants reaped millions of dollars in fees from other clients Defendants enticed into the scheme, which they knew or should have known to be an illegitimate tax sham

23 The objective of a BLIPS transaction is to "create" a paper capital loss to offset a real capital gain according to the following process that is prearranged by KPMG First, KPMG arranges a foreign bank line of credit for its customers who enter into the BLIPS transaction The line of credit consists of (i) a secured portion and (ii) a premium which enables the borrower to borrow additional amounts which are unsecured but subject to the banks strict collateral and pledge requirements This line of credit is contributed or assigned to a new Limited Liability Company. After the credit facility is assigned to the new LLC, the new LLC is then dissolved and a prearranged number of securities are distributed with a tax

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opinion that alleges that the securities have a basis equal to any capital contributed to the new LLC and the premium. As will be explained below, a short term capital loss is triggered by selling the shares By varying the amount of the line of credit and the timing of the dissolution of the new LLC, the promoters claimed to be able to vary the timing and the amount of the capital loss.

24 While the defendants were promoting and implementing the BLIPS transaction, the Internal Revenue Service ("IRS") announced in Notice 99-59, 1992-2 C B. 761, 999 IRB LEXIS 424, 1999-52 I R.B 761, (December 27, 1999) that "losses" resulting from BLIPS transactions would not be allowed

25. Defendants either knew or should have known from the outset that their BLIPS tax shelter would not pass muster with the IRS

26 On information and belief, after an investigation by the IRS into other tax improprieties by KPMG, the IRS began to investigate BLIPS and similarly fraudulent tax shelter schemes The IRS issued administrative summonses to KPMG, who informed the approximately 25 clients it had lured into the scheme of its receipt of those summonses. The scope and breath of defendants' fraudulent schemes, which include Defendants' fraud upon Swartz, is indicated in United States v KPMG LLP, Docket No 2003-358, Misc. No. 02-0295 (D D C. Dec 20, 2002); see Magistrate Judge Kay's Memorandum of Opinion of September 30, 2002

> As part of an Internal Revenue Service ("IRS") examination of KPMG's promotion of and participation in transactions that the IRS contends are tax shelters, the IRS served a total of twenty-five administrative summonses on KPMG seeking information and materials relevant to the investigation On January 28, 2002, the IRS issued a summons requesting information relating to two types of transactions, known as the Foreign Leveraged Investment Program ("FLIP") and the Offshore Portfolio Investment Strategy ("OPIS")

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> This summons is referred to as the "FLIP/OPIS Summons " *See Petition to Enforce Internal Revenue Service Summons ("Pet To Enf ") at 2-3* On March 19, 2002, the IRS issued six additional summonses to KPMG. These summonses are also referred to by the transactions to which they are directed, as the "BLIPS/TRACT/IDV Summons," the "401(k) ACCEL Summons," the "§ 6111(c) Summons," the "§ 6111(d) Summons," the "Foreign Transactions Summons," and the "MIDCO Summons " *Id* at 4-6 On May 3, 2002, the IRS issued two more summonses to KPMG the "Tax Treaty Summons" and the "FOCUS Summons " *Id At 6-7*

27. KPMG, one of the world's largest accounting and financial consulting firms, gained Swartz' trust by acting as his tax advisor KPMG exploited their knowledge and their position as a trusted fiduciary by making an aggressive sales pitch to Swartz, advising him that he could greatly reduce or eliminate the income tax liability that would otherwise result from the sale of his business

28. As stated in more detail below, KPMG, in a scheme with Brown & Wood and the other defendants, abused their position of trust by collecting millions of dollars of fees for putting into effect the BLIPS transaction that all of the Defendants knew or should have known was a sham Nevertheless, both KPMG and Brown & Wood provided Swartz with lengthy and detailed opinion letters (the "Opinion Letters") confirming the "'propriety" of the BLIPS scheme, in exchange for a large fee. The Opinion Letters were issued after, and fraudulently misrepresented the effect of, Notice 99-59, 1992-2 C B 761, 999 IRB LEXIS 424; 1999-52 I.R B 761, (December 27, 1999) in which the Internal Revenue Service and Treasury Department announced that they had become aware of certain types of transactions that were being marketed to taxpayers for the purposes of generating tax losses In issuing the notices, the IRS sought to alert taxpayers and their representatives that the purported losses arising from such transactions would not be allowable for federal income tax purposes

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29. On September 5, 2000, the Internal Revenue Service issued Notice 2000-44 which specifically described the "BLIPS/TRACT/IDV" transaction and stated that the promoters might be guilty of a criminal offense under Sections 7201, 7203, 7206, or 7212(a) of the Internal Revenue Code or other provisions of federal law Specifically, with respect to such liability, the Notice stated

> In addition, the Service and the Treasury have learned that certain persons who have promoted participation in transactions described in this notice have encouraged individual taxpayers to participate in such transactions in a manner designed to avoid the reporting of large capital gains from unrelated transactions on their individual income tax returns (Form 1040) Certain promoters have recommended that taxpayers participate in these transactions . the Service and the Treasury understand that these promoters have advised that the capital gains and losses from these transactions may be netted, so that only a small net capital gain or loss is reported on the taxpayer's individual income tax return In addition to other penalties, any person who willfully conceals the amount of capital gains and losses in this manner, or who willfully counsels or advises such concealment, may be guilty of a criminal offense under §§ 7201, 7203, 7206, or 7212(a) or other provisions of federal law

DETAILS OF SWARTZ' TRANSACTION AND DEFENDANTS' MISCONDUCT

KPMG Learned of Swartz' Potential Tax Liability

30 Swartz was a founder and executive of TCS Expeditions, Inc , which was in the business of operating educational travel programs In 1999, Swartz sold his shares in his company to Operating Educational Travel Programs, Inc., which acquired all of the outstanding shares in his company Swartz faced a possible capital gain of over $18 million on his stock sale which would have been reported as such on his 1999 federal income tax return. Although Swartz has been successful as a businessman, he is unsophisticated in tax matters and has always relied upon professional representation in determining his tax obligations

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31. In 1999, Swartz maintained a personal banking relationship with Commerce Bank of Washington ("Commerce Bank") The proceeds of Swartz' stock sale were deposited in his account with Commerce Bank. Swartz had a brokerage account with Merrill Lynch. Swartz' Merrill Lynch account representative was aware of the sale of Swartz' company and of the potential large capital gain that Swartz might have to recognize on his federal income tax return

32 The Merrill Lynch account representative referred Swartz to a former Merrill Lynch employee, then a KPMG employee, for tax planning and related professional services KPMG first contacted Swartz in August 1999 Swartz dealt most extensively with Mr Dale Baumann, a Partner in KPMG's Mountain View, California office

KPMG Defendants Marketed BLIPS To Swartz

33 The fraud perpetrated against Mr Swartz by Defendants was a part of Defendants broader conspiracy to defraud individuals and the United States government through the promotion, sale, and implementation of illegal tax shelter schemes Shortly after the sale of his business on July 12, 1999, Swartz was approached by Dale Baumann of KPMG, who informed him that KPMG had developed a strategy through which Swartz could legally shield from tax liability his substantial capital gain in 1999 resulting from the sale of the business Baumann informed Swartz that KPMG, together with Brown & Wood, had developed a strategy for a "select audience" of individuals who had sold large businesses or otherwise incurred large capital gains According to Baumann, these individuals could take advantage of a legal "loophole" in the tax law to shield all or most of their capital gains from taxation This strategy as described below was referred to by KPMG as the BLIPS transaction.

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34. Before revealing any aspect of the BLIPS strategy to Swartz, KPMG and Baumann required Swartz to sign a nondisclosure agreement forbidding Swartz from disclosing the strategy to any person

35. On August 3, 1999, Swartz signed written engagement letters and nondisclosure agreements provided to him by KPMG and retained KPMG as his accountants and tax advisers with respect to the BLIPS transactions Subsequently, KPMG and Baumann were engaged to provide Swartz tax advice and accounting services

36. On August 3, 1999, the KPMG Defendants informed Swartz that by forming a partnership to engage in a foreign currency options transaction, it was possible to "create" a large capital loss for tax purposes that would largely or entirely offset the capital gain realized as a result of the sale of Swartz' business in 1999, but that would result in either a far smaller loss in real terms, or possibly even a small profit

37. The essential features of the BLIPS transaction, as explained by the KPMG Defendants, were as follows

(a) First, the gist of BLIPS is to "create" a paper capital loss to offset a real capital gain by contributing a line of credit to a newly formed limited liability company. In this case, Swartz contributed (1) capital of $1,400,000 (2) a $53 million line of credit consisting of (i) a $33,300,000 line of credit secured by a $33,300,000 note and (ii) a $20,000,000 unsecured premium that was provided by Deutsche Bank AG and Deutsche Bank Securities, Inc and subsequently assigned to an entity created solely for this purpose known as Longs Strategic Investment Fund, LLC

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(b) After the credit facility is assigned to the new LLC, the new LLC is dissolved when the taxpayer intends to utilize his tax losses, and securities are distributed with a tax opinion which alleges that the securities have a basis equal to the capital contribution ($1,400,000), plus the loan premium ($20,000,000), minus the fair market value of any property distributed (in this case cash of $98,369, i e , $348,733 less the $250,000 fee paid to KPMG along with 364 shares of Microsoft Corporation having a fair market value of $39,897), plus/minus any income or loss from the investment fund (in this case Longs Strategic Investment earned interest income of $86,463 and purportedly lost $431,125) In Swartz' case, the KPMG tax opinion and Brown & Wood tax opinion fraudulently alleged that the 425 shares of Microsoft stock had a basis of $20,956,969 or $49,311 per share In applying this formula to Swartz' case, the sale of 364 shares of Microsoft stock would trigger a purported 1999 capital loss of $17,906,873

(c) By varying the amount of the line of credit and the timing of the dissolution of the new LLC, the promoters were able to vary the timing and the amount of the capital loss (In this case the $17,906,873 purported capital loss was generated within 60 days) In order to create the appearance of a legitimate business purpose, the BLIPS transaction was marketed as a hedging strategy in foreign currency futures In this case two trades were reported by Presidio Advisory Services, LLC The first trade was a Hong Kong Dollar short sale The second was an Argentine Peso short sale

38 Each of these steps proposed to Swartz by the KPMG Defendants, acting pursuant to an arrangement with Brown & Wood and Ruble, were to be fully planned in advance as a

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single transaction designed to reduce or eliminate tax liability for his substantial capital gains in 1999

39. The KPMG Defendants, acting pursuant to an arrangement with Brown & Wood and Ruble, advised Swartz that because the basis of his securities distributed upon withdraw of Longs Strategic Investment Fund, LLC would exceed $18,000,000, upon the sale of the securities, Swartz would realize a large capital loss that could be applied to substantially reduce or eliminate the large capital gains realized by Swartz in 1999 as a result of the sale of his business, and thus substantially reduce or eliminate Swartz' tax liability for these capital gains. The KPMG Defendants, acting pursuant to an arrangement with Brown & Wood and Ruble, further advised Swartz that the precise amount of capital loss that was to be generated by the BLIPS transaction could be chosen beforehand, and advised him not to choose a loss so large that it would offset the capital gains entirely

40 The KPMG Defendants further advised Swartz that the IRS might audit his tax return as a result of the BLIPS transaction, but that Brown & Wood and Ruble would provide him with an "opinion letter" that would confirm to the IRS' satisfaction the propriety of the BLIPS transaction and of Swartz claiming the resulting capital losses on his tax return. On information and belief, Brown & Wood and Ruble had already prepared "canned" opinion letters approving the BLIPS transactions and needed only to fill in several blanks for each of the many clients for whom they rendered such "opinion letters."

41 The KPMG Defendants informed Swartz that the total fee for bringing about the BLIPS transaction and providing him with the Brown & Wood opinion letter would be $250,000

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42 The KPMG Defendants also informed Swartz that depending on the exchange rate between the U S. dollar and the foreign currencies involved in the currency trading, Swartz could realize a pre-tax gain or loss as a result of trading in foreign currencies However, the KPMG Defendants assured Swartz that the tax benefits to him of the BLIPS transaction as a whole, resulting from the creation of capital losses to offset existing capital gains, far outweighed any losses that could be incurred as a result of the currency transactions

43 The KPMG Defendants advised Swartz that the capital losses created by the BLIPS transaction were legitimate and in accordance with all applicable tax laws, rules and regulations. In particular, the KPMG Defendants advised Swartz that the BLIPS transaction was not a "sham transaction" that would be ignored or disallowed for tax purposes and that the opinion letter of Brown & Wood would confirm this

44. The KPMG Defendants, acting pursuant to an arrangement with the Brown & Wood Defendants advised Swartz that the BLIPS transaction would require over 60 days to complete and had to be completed by the end of calendar year 1999 in order to have its desired effect

45 The KPMG Defendants refused to allow Swartz to retain copies of any of the materials reviewed by him, purportedly for confidentiality reasons.

<u>Swartz Took Defendants' Advice And Engaged In The BLIPS Transaction</u>

46 Based on and in reasonable reliance on his relationship of trust and confidence with the KPMG Defendants, their advice, and on the promised formal opinion letter of Brown & Wood confirming the propriety of the BLIPS strategy, and based on the representations of

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Baumann, Swartz decided to engage in the BLIPS transaction KPMG and the other Defendants orchestrated the entire BLIPS transaction for Swartz.

47 On September 30, 1999, based on and in reasonable reliance on the direction of the KPMG Defendants, the promised formal opinion letter of Brown & Wood confirming the propriety of the BLIPS strategy, and the representations of Baumann, Swartz through Presidio Advisory Services, Presidio Growth, Deutsche Bank and Deutsche Bank Securities entered into a Credit Agreement for $33 3 million which required an additional premium of $20 million.

48. On October 12, 1999, at the direction of the defendants, Swartz assigned a Letter of Credit issued by Deutsche Bank in the amount of $33.3 million to Longs Strategic Investment Fund, LLC

49 On November 29, 1999, based on and in reasonable reliance on the direction of the KPMG Defendants, the promised formal opinion letter of Brown & Wood confirming the propriety of the BLIPS strategy, and the representations of Baumann, Swartz requested the withdrawal of his capital account balance of Longs Strategic Investment Fund, LLC On November 30, 1999, Steven Buss, the Managing Director of Presidio Growth, LLC and Presidio Advisory Services, Inc elected to dissolve Longs Strategic Investment Fund, LLC effective December 13, 1999, and to terminate the Deutsche Bank Line of Credit

50. As a result of the above transactions Swartz paid a fee to KPMG of $250,000; a management fee to Presidio of $550,000, and fees to Deutsche Bank which included $678,460 in interest, $49,312 representing a bank custody fee plus a $117,334 breakage fee and a $16,539 guaranteed payment fee. In addition, Swartz incurred a loss of $187,790 on two

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currency transactions, one involving Argentine Pesos and the second involving Hong Kong Dollars

51 On information and belief, Deutsche Bank Inc and Deutsche Bank Securities, Inc had completed many transactions with KPMG and Presidio Growth LLC and Presidio Advisors, LLC and knew that they would be able to charge excessive fees for the BLIPS transaction because they knew that the primary purpose of the BLIPS transaction was the generation of tax losses. On information and belief, this transaction was different from a transaction in the ordinary course of business for Deutsche Bank and Deutsche Bank Securities as evidenced by the fact that (i) Deutsche Bank had no prior relationship with Swartz, (ii) Deutsche Bank extended a $53 million line of credit to Swartz (or an entity owned by him), (iii) the Deutsche Bank executives entered into the credit agreement without ever meeting Swartz, (iv) and within a few weeks of entering into the line of credit agreement, Deutsche Bank approved the assignment of the $53 million line of credit to Longs Strategic Investment Fund, which was managed by Presidio Growth, LLC, which was indirectly owned 90% by Swartz, again without having ever met with Swartz

52 Dale Baumann of KPMG implemented all transactions with Deutsche Bank and Presidio Advisory Services, LLC and Presidio Growth LLC

53 On or about December 13, 1999, the Deutsche Bank Line of Credit was liquidated at and in reasonable reliance on the instructions of the KPMG Defendants, the promised formal opinion letter of Brown & Wood confirming the propriety of the BLIPS strategy, and the representations of Baumann As a distribution in liquidation of Longs Strategic Investment

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Fund, LLC, Swartz received cash of $98,733 and 425 shares of Microsoft Corporation stock with a value of $39,897 after payment of all the fees associated with the BLIPS transaction.

Defendants' Further Advice And Opinion Letters To Swartz

54. The KPMG and Brown & Wood Defendants each issued an Opinion Letter dated December 31, 1999, that confirmed to Swartz that as a result of the above-described series of steps taken by Swartz between September 30 and December 13, 1999, Swartz could properly claim capital losses on his individual tax return for 1999 in the total amount $18,237,999

55. In the Brown & Wood opinion letter, Brown & Wood and defendant Ruble advised Swartz, among other things (1) that Swartz had made a capital contribution of $54,700,000 which includes a $33,300,000 line of credit secured by a note of $33,300,000 to Deutsche Bank, a loan premium of $20,000,000 from Deutsche Bank which is unsecured by a note, and a capital contribution of $1,400,000, (2) that the $20,000,000 loan premium would not constitute a liability to the Investor or the Partnership for purposes of Code §754, when the line of credit has not been utilized; (3) upon liquidation of Swartz' partnership interest, Swartz would have an adjusted basis of $21,400,000 [$20,000,000 line of credit, plus $1,400,000 capital contribution] plus or minus it's applicable share of partnership income or loss in its partnership interest, reduced by actual cash received of $348,733 and a residual amount allocated to the 425 shares of Microsoft Corporation received which were valued at $39,879, (4) "[t]he step transaction and sham transaction doctrines should not apply to the transactions described herein," (5) and the various steps of the BLIPS transaction described above was "meaningful and imbued with non-tax considerations." The substance of these and the remaining opinions contained in the Brown & Wood opinion letter was to assure Swartz

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that he was legally entitled to a capital loss of $18,227,999 after the liquidation of Longs Strategic Investment Fund, LLC which could be used to offset approximately $18,000,000 in capital gain generated from the sale of Swartz' business Additionally, Brown & Wood and Ruble included in their opinion letter the finding that "the Transaction would not constitute a tax shelter within the meaning of [Internal Revenue] Code Section 6111(c)(1) and, therefore, would not be required to be registered under Code Section 6111(a) "

56 In reasonable reliance on the tax advice, legal advice and professional services rendered by the defendants, Swartz signed and filed his 1999 federal income tax return

57 Brown & Wood and Ruble knew or should have known at the time they issued their opinion letter that the BLIPS transaction did constitute a tax shelter within the meaning of Code Section 6111(c)(1), and that they, along with the KPMG Defendants, were therefore illegally promoting an unregistered tax shelter by marketing the BLIPS transaction to their clients. Nevertheless, the defendants failed to inform Swartz of the illegality of the BLIPS tax shelter scheme and, in fact, advised him to the contrary

58. The KPMG Defendants knew or should have known when they advised Swartz to enter into the BLIPS transactions and when they prepared Swartz' 1999 federal income tax return that the BLIPS transactions did constitute a tax shelter within the meaning of Code Section 6111(c)(1) and that they, along with Brown & Wood and Ruble, were therefore illegally promoting an unregistered tax shelter by marketing the BLIPS transactions to their clients The defendants failed to inform Swartz of this and, in fact, advised him to the contrary.

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59 The KPMG opinion letter and the Brown & Wood opinion letter fraudulently ignored the intent of IRS Notice 1999-59, published on December 27, 1999, entitled "Tax Avoidance Using Distributions of Encumbered Property " In that notice, the IRS stated

> [T]he Internal Revenue Service and Treasury Department have become aware of certain types of transactions, as described below, that are being marketed to taxpayers for the purpose of generating tax losses. This notice is being issued to alert taxpayers and their representatives that the purported losses arising from such transactions are not properly allowable for federal income tax purposes
>
> Through a contrived series of steps, taxpayers claim tax losses for capital outlays that they have in fact recovered Such artificial losses are not allowable for federal income tax purposes

60. As a result of IRS Notice 1999-59 and otherwise, KPMG and the Brown & Wood Defendants knew or should have known at the time they issued their opinions letters to Swartz that the purported losses arising from the BLIPS transaction were not properly allowable for federal income tax purposes, but failed to inform Swartz of this and indeed informed him to the contrary.

61. The KPMG Defendants, before soliciting Swartz, before providing advice and direction to him in carrying out the BLIPS transactions, and otherwise before preparing Swartz' 1999 tax return, knew or should have known, that the purported losses arising from the BLIPS transaction were not properly allowable for federal income tax purposes, but failed to inform Swartz of this and indeed informed him to the contrary

62. On September 5, 2000, the IRS published Notice 2000-44, entitled "Tax Avoidance Using Artificially High Basis " That Notice addressed "similar transactions [to those described in Notice 1999-59] that purport to generate tax losses for taxpayers " Notice 2000-44 specified the precise transaction marketed by the Defendants to Swartz as the BLIPS

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transaction, under which the taxpayer purchases call options and simultaneously writes offsetting call options, transfers the option positions to a partnership, and ultimately claims that the basis in his partnership interest "is increased by the cost of the purchase call options but is not reduced under [Internal Revenue Code] § 752 as a result of the partnership's assumption of the taxpayer's obligation " The IRS again stated that "[t]he purported losses from these transactions (and from any similar arrangements designed to produce noneconomic tax losses by artificially overstating basis in partnership interests) are not allowable as deductions for federal income tax purposes "

63. The Defendants knew or should have known, as a result of IRS Notice 2000-44 or otherwise, that the purported losses arising from the BLIPS transaction were not properly allowable for federal income tax purposes, but failed to inform Swartz of this Defendants failed to retract or modify in any way their advice or the opinions expressed in their opinion letters to Swartz, advice and the prepared tax return, which all had the effect of confirming the propriety of claiming as an increase in basis the cost of the long options on Swartz' 1999 income tax return

Swartz' Discovery Of Defendants' Fraudulent Scheme

64 Although KPMG served as Swartz' accountants in recommending and implementing his participation in the BLIPS scheme, Swartz relied upon Moss Adams LLP, ("Moss Adams") a Seattle accounting firm, to prepare his tax return

65 On August 25, 2000, Moss Adams sent a letter to Swartz questioning the validity and legitimacy of the tax opinions provided to Swartz by KPMG and Brown & Wood Moss Adams advised Swartz that it had requested the assistance of defendant Dale Baumann to

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determine the scope of the disclosures necessary to limit Swartz' exposure to the accuracy-related penalty of Section 6662 Moss Adams stated that its accountants had reviewed Notice 2000-44, dated August 11, 2000, and believed it directly addressed Swartz' BLIPS transaction. Moss Adams went on to state that it had advised KPMG of its understanding that the Internal Revenue Service considered "purported" losses resulting from such transactions not to represent *bona fide* losses and that they therefore were not allowable as deductions for federal income tax purposes. In response to Moss Adams serious reservations as to the validity of the BLIPS transaction, defendant Baumann indicated that if Moss Adams were uncomfortable with the limited disclosure he had recommended, that KPMG would be pleased to prepare the tax return. Moss Adams stated that, given the publication of Notice 2000-44, Moss Adams would not be able to prepare Swartz' 1999 Individual Tax Return unless the return included the filing of a comprehensive disclosure statement (Form 8275 or 8275-R) with respect to the transaction at issue. Moss Adams advised Swartz that it could not gain the level of comfort it deemed necessary to ensure that Swartz would be protected from the accuracy-related penalty of Section 6662 given the filing position proposed by KPMG

66. On October 10, 2000, Shannon Liston of KPMG send an e-mail to Michael Hall of Moss Adams advising him (i) not to worry about making changes to the white paper disclosure, (ii) that KPMG would take care of any changes to existing disclosures and adding new disclosures, (iii) requesting that Moss Adams delete Longs Strategic Investment Fund, LLC short-term capital loss of $914,815 reported on Statement 14 of the 1999 Federal Tax Return, (iv) and directing Moss Adams to add a short-term capital loss from Swartz' disposition of Microsoft stock

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67 On October 10, 2000, Michael G Hall of Moss Adams sent a letter to Shannon Liston of KPMG, stating that Moss Adams had resigned from its engagement to prepare Swartz' 1999 U S Individual Income Tax Return, stating as its reason that it did not agree with the changes KPMG had requested be made to Swartz' tax return.

KPMG Notifies Swartz of Problems with BLIPS Transaction

68 On October 4, 2000, after all of the elements of the BLIPS transaction had occurred, the KPMG Defendants wrote to Swartz and for the first time advised him that the tax benefits that they had promised him from the BLIPS transaction might be disallowed by the IRS By letter dated October 6, 2000, Swartz immediately proposed that KPMG agree to rescind their September 3, 1999, agreement and that KPMG refund the amount of his investment in the BLIPS investment vehicles The KPMG defendants refused Swartz' proposal

69 On February 21, 2002, defendant Baumann mailed Swartz a letter stating that KPMG was under examination with respect to its obligation to register and maintain lists on tax shelters and that KPMG expected the IRS to require KPMG to furnish a list of clients that participated in transactions that the government might consider substantially similar to the transactions described in Notice 2000-44, 2000-2 C B 255 (*i e*, BLIPS and similar transactions) The letter also stated that the Internal Revenue Service had recently announced its willingness to waive potential accuracy-related penalties for certain disclosed items, and that KPMG recommended that Swartz take advantage of any opportunity afforded to him by this initiative The letter advised Swartz to make a prompt disclosure in accordance with the IRS announcement

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70 Brown & Wood sent a similar letter to Swartz on March 5, 2002, wherein the law firm advised Swartz that he should consider disclosing to the IRS that he had participated in the BLIPS transaction and that KPMG had filed a return on his behalf reflecting the effect of the transaction

<u>The Conspiracy And Partnership Among The Defendants</u>

71. On information and belief, the KPMG Defendants, Brown & Wood and Ruble, entered into an agreement, association and union associated in fact to devise and promote the BLIPS transactions, for the purpose of receiving and splitting millions of dollars in fees ("the Defendants' arrangement") The receipt of those fees was the sole motive in the development and execution of the scheme Further, the amount of fees earned by the aforementioned Defendants was not tied to or reflective of the amount of time and effort they expended in providing legal, tax or accounting services, but rather was tied to the amount of the capital losses each client would claim on his or her tax returns and the amount of the tax the clients would avoid. Indeed, the aforementioned Defendants devised the scheme and agreed to provide a veneer of legitimacy to each others' opinions as to the lawfulness and tax consequences of the plan by agreeing to issue allegedly "independent" opinions, before potential clients were solicited The aforementioned Defendants then proposed the transactions to Swartz, as well as other clients, and solicited their use of the BLIPS transactions, rather than simply respond to requests for tax guidance and advice from existing clients. Accordingly, the receipt of fees and the pecuniary gain from those fees was the sole motive for those Defendants' conduct, the provision of professional services to clients was merely an incidental by-product of, not a motivating factor for, Defendants' conduct alleged

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herein. Further, the Defendants' arrangement gave each of the participating Defendants a significant pecuniary interest in the advice and professional services they would render, allowed the KPMG Defendants to direct and regulate the professional judgment of the Brown & Wood Defendants, and impaired the exercise of that judgment and the duty of care, loyalty and honesty each of the aforementioned Defendants owed to Swartz and their other clients

72. The KPMG Defendants had a financial, business and property interest in inducing Swartz, as well as other clients, to enter into the BLIPS transactions, and to do so, promised, opined and assured that the transactions would enable Swartz and others to avoid taxes. The KPMG Defendants never disclosed to Swartz that their representation of him and their objectivity, integrity and professional care would be materially impaired by their own interests in the transactions in violation of Sections 53, 54 and 55 of the American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct.

73. The Presidio Defendants and the Deutsche Bank defendants were active participants in the conspiracy with the KPMG Defendants and the Brown & Wood Defendants All of these defendants knew that the series of BLIPS transactions were predetermined steps to generate sham losses for the purpose of obtaining tax benefits The defendants conducted these transactions numerous times in a pattern of fraud and deception

DAMAGES SUFFERED BY SWARTZ

74 As a direct and proximate result of the wrongful conduct of the defendants, Swartz incurred out-of-pocket losses of approximately $2 million In addition, Swartz will incur penalties and interest on his unpaid taxes, will incur additional professional fees to mitigate

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the damages caused by the defendants, and has foregone the opportunity to minimize his taxes for 1999 through legitimate tax planning alternatives

75. All of the above factual recitations are realleged and incorporated in the paragraphs below as if fully set forth therein.

COUNT 1
Violation of RICO, 18 U.S.C. § 1962(c) & (d)
(All Defendants)

76 Defendants' arrangement described herein constitutes an ongoing organization, with an ascertainable structure and purpose beyond the predicate acts and the conspiracy to commit such acts, by which the Defendants function as a continuing unit comprised of said Defendants

77. Defendants associated themselves with each other to form an enterprise (the "Enterprise") for the purpose of selling various tax schemes for many millions, if not billions, of dollars The Defendants knew that many of these tax schemes, including the BLIPS scheme set forth above, were contrary to law The Enterprise engaged in, and its activities affected, interstate commerce, including the provision of legal, accounting, investment, banking and tax services across state lines

78 Defendants conducted or participated in the conduct of the Enterprise's affairs through a pattern of racketeering activity consisting of, *inter alia*, more than two acts of mail fraud and wire fraud (in violation of 18 U S C §§ 1341 and 1343, respectively) As part of this pattern, continuing over the course of years, by using the mails, private interstate carriers and interstate wire communications, the Defendants, through their Enterprise, sold their bogus tax schemes to scores, if not hundreds, of clients, including Swartz In particular, without

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limitation, in violation of 18 U S.C §§ 1341 and 1343, Defendants employed the Postal Service and/or private or commercial interstate carriers and/or interstate wire communications to send their retainer letters, invoices, opinion letters, tax advice, investment advice and prepared tax returns to Swartz and many other clients, and to receive from Swartz and many other clients payments of Defendants' invoices, all as set forth above

79 Each Defendant's conduct as set forth herein was in concert with each of the other Defendant's conduct, and planned and pre-arranged with and known by each of the other said Defendants pursuant to said Defendants' common scheme to sell phony tax strategies for millions or billions of dollars.

80. Defendants' conduct of the Enterprise and their pattern of racketeering activity commenced prior to August 1999 when they first contacted Swartz to solicit their participation in the BLIPS scheme and continued through at least June 2002 when the Defendants continued to send fraudulent letters that did not reveal, and in fact hid, the full extent of the Defendants' racketeering conduct.

81. Defendants' conduct of the Enterprise and their pattern of racketeering activity was not limited to the acts involving Swartz but included acts directed at many other clients as well. On information and belief, Defendants continued to engage in racketeering activity designed to promote illegal tax shelters, and to disguise and hide the illegal nature of their prior acts, posing the threat of continuing criminal activity during and after the time of their dealing with Swartz.

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82 On ınformation and belıef, Defendants have combıned ın an Enterprise to sell other ıllegal tax shelters, actıvıty that spans a longer perıod of tıme than the BLIPS scheme, and that poses the threat of contınuıng crımınal activıty

83 As a result of saıd Defendants' conduct set forth hereın, Swartz has suffered ınjury ın hıs business and property ın that he has paıd Defendants fees and has incurred losses ın excess of $2 mıllıon, has ıncurred or will incur tax penalties and ınterest, has ıncurred and will continue to incur substantial additıonal costs ın hırıng new tax and legal advisors to rectıfy the situatıon, and has foregone legıtımate tax savings opportunitıes.

84. As proxımate result of the foregoıng, Swartz have been ınjured ın an amount to be proved but belıeved to be at least $2 mıllıon, and should be awarded judgment agaınst the defendants, jointly and severally, consıstıng of treble damages of at least $6 million, plus attorneys' fees and costs

COUNT 2
Breach Of Fiduciary Duty
(KPMG Defendants and Brown & Wood Defendants)

85 The KPMG Defendants and the Brown & Wood Defendants, as Swartz' accountants and attorneys, were Swartz' fiducıaries, and thus owed Swartz the dutıes of honesty, loyalty, care and compliance wıth the applıcable codes of professıonal responsıbılıty

86 The KPMG Defendants and the Brown & Wood Defendants breached these dutıes to Swartz by advısıng Swartz to engage ın the BLIPS transactions, and to sıgn and file the tax return prepared by KPMG and others ın relıance on saıd Defendants' advice, which said Defendants knew or should have known to be ımproper, for the sole purpose of generatıng huge fees for saıd Defendants

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87. As a result of said Defendants' conduct set forth herein, Swartz has suffered injury in his business and property in that he has paid Defendants fees and has incurred losses believed to be in excess of $2 million, has incurred or will incur tax penalties and interest; has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation, and has foregone legitimate tax savings opportunities

COUNT 3
Fraud
(All Defendants)

88. In order to induce Swartz to pay them hundreds of thousands of dollars of fees, the KPMG Defendants and Brown & Wood Defendants made numerous knowingly false affirmative representations and intentional omissions of material fact to Swartz, including (1) stating that the so-called BLIPS transaction entitled a taxpayer to include the amount of an unused loan premium on a line of credit in his basis for calculating capital losses thus offsetting capital gains in an unrelated transaction, (2) failing to disclose existing published authority, including Notices published by the IRS, that purported losses arising from such transactions as the BLIPS transaction are not properly allowable for federal income tax purposes, (3) failing to disclose that if Swartz filed a tax return claiming capital losses based on the BLIPS transaction, he would be liable for penalties and interest, (4) failing to advise Swartz to amend his return, (5) making and endorsing the statements contained in the opinion letters signed by KPMG and Brown & Wood and (6) making and endorsing the statements contained in their oral advice and the 1999 tax return prepared by KPMG

89. The above affirmative representations made by each said Defendant were false when made and said Defendants knew these representations to be false when made with the

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intention that Swartz rely upon them in entering into-the BLIPS transactions and pay them hundreds of thousands of dollars in fees In addition, the above omissions of material fact were made knowingly by said Defendants, also with the intent to induce Swartz to enter into the BLIPS transactions and pay them millions of dollars in fees

90. By its affirmative misrepresentations and intentional omissions of material facts, the KPMG Defendants induced Swartz to enter into an engagement letter that purportedly waived claims and damages and required mediation and arbitration Such agreements are void, against public policy, invalid, revocable and unenforceable.

91. In reasonable reliance on said Defendants' false representations and misleading omissions regarding the BLIPS transactions, Swartz paid hundreds of thousands of dollars to Defendants for tax and legal advice, paid millions of dollars in additional expenses to execute the BLIPS transaction, did not avail himself of legitimate tax savings opportunities, filed a federal tax return in 1999 that reflected deductions for capital losses resulting from the BLIPS transactions and did not amend the tax return in 2000, 2001 or 2002, thereby incurring additional penalties and interest But for Defendants' intentional misrepresentations and material omissions described above, Swartz would never have hired Defendants for advice on the BLIPS strategy, engaged in the BLIPS transactions, claimed the purportedly resulting capital losses on his income tax return, or filed and signed his 1999 tax return as prepared by the KPMG Defendants or in reliance on said Defendants' advice, failed to amend said return in 2000, 2001 and 2002, and failed to avail himself of legitimate tax savings opportunities

92 On information and belief, the Presidio Defendants and the Deutsche Bank Defendants knew that the KPMG Defendants and the Brown & Wood Defendants were

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making such false statements to clients, including Swartz, and thus were acting in concert with the KPMG Defendants and Brown & Wood Defendants Furthermore, the defendants, and each of them, were acting as agents of the others in the perpetration of the illegal scheme.

93. After discovering said Defendants' fraud, Swartz incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation

94 As a result of said Defendants' conduct set forth herein, Swartz has suffered injury in his business and property in that he has paid Defendants fees and has incurred losses believed to be in excess of $2 million; has incurred or will incur tax penalties and interest, has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation, and has foregone legitimate tax savings opportunities

COUNT 4
Negligent Misrepresentation/Professional Malpractice
(KPMG Defendants and Brown & Wood Defendants)

95 As Swartz' tax advisers, accountants and attorneys, the KPMG Defendants and the Brown & Wood Defendants owed Swartz a duty of care, loyalty and honesty and to comply with the applicable provisions of their codes of professional responsibility.

96 During the course of their representation of Swartz, the KPMG Defendants and Brown & Wood Defendants made numerous knowingly or negligently false affirmative representations and intentional or negligently misleading omissions of material fact to Swartz, including: (1) stating that the so-called BLIPS transaction entitled a taxpayer to include the amount of an unused loan premium on a line of credit in his basis for calculating capital losses thus offsetting capital gains in an unrelated transaction, (2) failing to disclose existing published authority, including Notices published by the IRS, that purported losses arising

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from such transactions as the BLIPS transaction are not properly allowable for federal income tax purposes, (3) failing to disclose that if Swartz filed a tax return claiming capital losses based on the BLIPS transaction, he could be liable for penalties and interest, (4) failing to advise Swartz to amend his return, (5) making and endorsing the statements contained in the opinion letters signed by Brown & Wood; and (6) making and endorsing the statements contained in the 1999 tax return prepared by KPMG or in reliance on said Defendants' advice. Said Defendants either knew or reasonably should have known their advice to be false In so doing, said Defendants failed to exercise the standard of care required of them as accountants and attorneys.

97 Swartz fully performed his obligations to the KPMG Defendants and the Brown & Wood Defendants under the terms of their engagement

98 In reasonable reliance on said Defendants' false representations and misleading omissions regarding the BLIPS transaction, Swartz paid millions of dollars to Defendants for tax and legal advice, paid millions of dollars in additional expenses to execute the BLIPS transaction, did not avail himself of legitimate tax savings opportunities, filed a federal tax return in 1999 that reflected deductions for capital losses resulting from the BLIPS transaction, and did not file an amended return in 2000, 2001 and 2002 But for said Defendants' intentional or negligent misrepresentations and material omissions described above, Swartz would never have hired Defendants for advice on the BLIPS strategy, engaged in the BLIPS transactions, claimed the purportedly resulting capital losses on his income tax return, signed and filed his 1999 tax return as prepared by KPMG or in reliance on said

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Defendants' advice, did not file an amended return and did not avail himself of legitimate tax savings opportunities

99. After discovering said Defendants' misrepresentations. Swartz incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation

100 As a result of said Defendants' conduct set forth herein, Swartz has suffered injury in his business and property in that he has paid Defendants fees and has incurred losses in excess of $2 million; has incurred or will incur tax penalties and interest; has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation, and has foregone legitimate tax savings opportunities

COUNT 5
Breach Of Contract
(KPMG Defendants and Brown & Wood Defendants)

101. The KPMG Defendants and Brown and Wood Defendants entered into oral and written contracts to provide Swartz with professionally competent tax advice, legal services, accounting services and tax return preparation services, to exercise the applicable standard of care, loyalty and honesty, and to comply with all applicable rules of professional contact

102 Swartz fully performed his obligations to the KPMG Defendants and the Brown & Wood Defendants under the terms of their engagement.

103 The KPMG Defendants and Brown and Wood Defendants disregarded their obligations and instead provided Swartz with advice that these Defendants either knew or should have known to be wrong and illegal.

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104 As a result of said Defendants' conduct set forth herein, Swartz has suffered injury in his business and property in that he has paid Defendants fees and has incurred losses in excess of $2 million; has incurred or will incur tax penalties and interest, has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation, and has foregone legitimate tax savings opportunities.

105 In the alternative, Swartz is entitled to the benefit of his bargain with the KPMG defendants, i.e., the value of the tax benefits that would have been realized by Swartz had the capital losses produced by the BLIPS transaction been legitimate. This amount is believed to be approximately $3 6 million

COUNT 6
Declaratory Judgment
(All Defendants)

106 The IRS has commenced audits of Swartz' 1999 tax return On information and belief, Swartz understands he may incur interest and/or penalties assessed by the IRS as a consequence of Swartz' engaging in the BLIPS transactions, as advised and implemented by the Defendants, and will incur additional professional fees to rectify said Defendants' wrongdoing

107 Defendants are legally responsible for such interest and/or penalties and/or professional fees incurred by Swartz on account of said Defendants' violation of RICO, breach of fiduciary duty, fraud, negligent misrepresentation, malpractice, and breach of contract, as set forth, above

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108. As a result of said Defendants' conduct set forth herein, Swartz has incurred or will incur tax penalties and interest and has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation.

109 Pursuant to 28 U S C § 2201, Swartz is entitled to a declaration that Defendants are liable to Swartz for such penalties, interest, professional fees, and damages

110 Pursuant to 28 U S C § 2201, Swartz is entitled to a declaration that KPMG engagement letters are void and unenforceable to the extent that they would limit any remedy available to Swartz or his access to any forum in which such remedies could be sought and awarded

COUNT 7
Washington Consumer Protection/Unfair Business Practices Act
RCW 19.86
(All Defendants)

111 This claim for relief arises under RCW 19 86 *et seq* , the Washington Consumer Protection/ Unfair Business Practices Act (CPA)

112. In their marketing of certain tax "strategies" to prospective consumers and in their knowing participation in a wide-spread scheme to implement illegal tax shelters, the defendants have engaged in "unfair or deceptive acts or practices in the conduct of any trade or commerce" within the meaning of the CPA

113 The KPMG Defendants and the Brown & Wood Defendants informed consumers that the tax "strategies" they had designed were within the legal boundaries as determined by the IRS This practice amounted to deception and unfair trade practices, as these Defendants knew that there was a distinct probability that the "strategies" they had

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developed would be found unlawful by the IRS, yet they dıd not ınform theır consumers of thıs probabılıty

114 This practıce of deceptıvely marketıng tax "strategıes" ıs one that was likely to mıslead consumers acting reasonably ın the same cırcumstances as Swartz

115 On ınformatıon and belıef, the Presıdıo Defendants and the Deutsche Bank Defendants knowıngly and actively partıcıpated ın the ımplementatıon of the scheme, even after the legitımacy of the BLIPS transactıons had been publıcly challenged by the IRS. Without the actıve partıcipatıon of these defendants, the unfair and deceptıve acts perpetrated against Swartz and other consumers could not have occurred

116 As a result of said Defendants' conduct set forth hereın, Swartz has suffered ınjury ın his business and property ın that he has paıd Defendants fees and has ıncurred losses in excess of $2 mıllıon, has ıncurred or wıll ıncur tax penaltıes and ınterest, has ıncurred and will continue to ıncur substantial additıonal costs ın hırıng new tax and legal advısors to rectıfy the sıtuatıon, and has foregone legıtımate tax savıngs opportunıtıes

117 As a proximate result of the foregoıng, Swartz has been ınjured ın an amount to be proved but belıeved to be at least $2 mıllıon, and should be awarded ȷudgment agaınst the defendants, ȷointly and severally, consıstıng of actual damages trebled to the maxımum amount provıded by law, plus attorneys' fees and costs.

COUNT 8
Civil Conspiracy
(All Defendants)

118 As descrıbed more fully above, the Defendants knowıngly acted ın concert to market and ımplement the fraudulent and ıllegal BLIPS tax shelter scheme

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119 In so doing, the Defendants acted with full knowledge and awareness that the scheme was designed to give the false impression that a complex series of financial transactions were legitimate business investments, when in fact they were not.

120 The Defendants acted in their respective roles as described above according to a predetermined and commonly understood and accepted plan of action, all for the purposes of obtaining professional fees, commissions, interest payments and other transactional fees from consumers, including Swartz

121. The acts of the defendants were contrary to numerous provision of law, as stated above

122. As a result of said Defendants' conduct set forth herein, Swartz has suffered injury in his business and property in that he has paid Defendants fees and has incurred losses in excess of $2 million, has incurred or will incur tax penalties and interest, has incurred and will continue to incur substantial additional costs in hiring new tax and legal advisors to rectify the situation, and has foregone legitimate tax savings opportunities

PRAYER FOR RELIEF

WHEREFORE, Theodore C Swartz prays for judgment in his favor as follows

1 Against all defendants, jointly and severally, for actual damages in an amount to be proven at trial and believed to be in excess of $2 million, trebled to at least $6 million, plus attorneys' fees and costs, for violation of RICO, 18 U S C 1962.

2. Against all defendants, jointly and severally, for actual damages in an amount to be proven at trial and believed to be in excess of $2 million, trebled to the maximum

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extent provided by law, plus attorneys' fees and costs, for violation of the Washington Consumer Protection/Unfair Business Practices Act

3 Against the KPMG Defendants, jointly and severally, for actual damages in an amount to be proven at trial and believed to be in excess of $2 million, for professional negligence and breach of fiduciary duty and for $3 6 million for breach of contract

4 Against the Brown & Wood Defendants, jointly and severally, for actual damages in an amount to be proven at trial and believed to be in excess of $2 million, for professional negligence and breach of fiduciary duty and for $3 6 million for breach of contract

5 Against all defendants, jointly and severally, for actual damages in an amount to be proven at trial and believed to be in excess of $2 million for fraud, misrepresentation, and conspiracy

6 Against all defendants, jointly and severally, for declaratory relief setting forth their obligation to indemnify and hold plaintiff harmless from fees, costs, damages, interest and penalties arising from the plaintiff's ongoing efforts to rectify the Defendants' wrongdoing

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7 Against all defendants, jointly and severally, for exemplary damages, attorneys' fees and costs to the maximum extent provided by any applicable provision of law, including RICO and the Washington Consumer Protection/Unfair Business Practices Act

8 For such other relief as the Court deems just and equitable

DATED this 6TH day of June, 2003

BADGLEY MULLINS LAW GROUP

By Don Paul Badgley Duncan C Turner

Don Paul Badgley WSBA # 457
Duncan C Turner WSBA # 20597
Attorneys for Plaintiff

THE ISAACSON LAW FIRM

By ______________________

Brian G. Isaacson WSBA # 25921
Attorneys for Plaintiff

VERIFICATION

Theodore C Swartz deposes and states, under penalty of perjury of the laws of the State of Washington, that he has read the above Complaint, has personal knowledge of the facts stated therein and is competent to testify as to the same, and that the facts as stated are true and correct to the best of his knowledge and belief

Signature ______________________

Date ______________________

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8. For such other relief as the Court deems just and equitable.

DATED this 6TH day of June, 2003.

BADGLEY MULLINS LAW GROUP

By Don Paul Badgley Duncan C Turner
Don Paul Badgley WSBA #457
Duncan C. Turner WSBA #20597
Attorneys for Plaintiff

THE ISAACSON LAW FIRM

By Brian G. Isaacson
Brian G. Isaacson WSBA #25921
Attorneys for Plaintiff

VERIFICATION

Theodore C. Swartz deposes and states, under penalty of perjury of the laws of the State of Washington, that he has read the above Complaint, has personal knowledge of the facts stated therein and is competent to testify as to the same, and that the facts as stated are true and correct to the best of his knowledge and belief.

Signature: ______________________

Date: ______________________

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BADGLEY MULLINS LAW GROUP

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Don Paul Badgley WSBA # 457
Duncan C. Turner WSBA # 20597
Attorneys for Plaintiff

THE ISAACSON LAW FIRM

By
Brian G. Isaacson WSBA # 25921
Attorneys for Plaintiff

VERIFICATION

Theodore C. Swartz deposes and states, under penalty of perjury of the laws of the State of Washington, that he has read the above Complaint, has personal knowledge of the facts stated therein and is competent to testify as to the same, and that the facts as stated are true and correct to the best of his knowledge and belief.

Signature: ______________________

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C03-1252P

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace or supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of the court This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet

I. (a) PLAINTIFF
Theodore C Swartz

(b) COUNTY OF RESIDNCE OF FIRST LISTED PLAINITFF King
(EXCEPT IN U S PLAINTIFF CASES)

DEFENDANTS
KPMG, LLP, PRESIDIO GROWTH, LLC, PRESIDIO ADVISORY SERVICES, INC, HAYES STREET MANAGEMENT, INC NORWOOD HOLDINGS, INC, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC, SIDLEY AUSTIN BROWN & WOOD, LLP, DALE R BAUMANN JOHN M LARSON, ROBERT A PFAFF DAVID AMIR MAKOV, STEVEN BUSS, R J RUBLE

COUNTY OF RESIDNCE OF FIRST LISTED PLAINITFF King
(IN U S PLAINTIFF CASES ONLY)
NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OFF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME ADDRESS, AND TELEPHONE)
Don Paul Badgley
Duncan C Turner
Badgley-Mullins Law Group (206) 621-6566
Washington Mutual Tower Building
1201 Third Avenue, Suite 5100
Seattle, Washington 98101

ATTORNEYS (IF KNOWN)

FILED ENTERED
LODGED RECEIVED
JUN 06 2003 PM
AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

II BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

☐ 1 U S Government Plaintiff
☐ 2 U S Government Defendant
☒ 3 Federal Question (U S Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only) (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐1	☐1	Incorporated *or* Principal Place of Business In This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated *and* Principal Place of Business In Another State	☐5	☐5
Citizen of Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

IV. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

☒1 Original Proceeding ☐2 Removed from State Court ☐3 Remanded from Appellate Court ☐4 Reinstated or Reopened ☐5 Transferred from another district (specify) ☐6 Multidistrict Litigation ☐7 Appeal to District Judge from Magistrate Judgment

V NATURE OF SUIT (PLACE AND "X" IN ONE BOX ONLY)

CONTRACT
☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment & Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loans (Excl Veterans)
☐ 153 Recovery of Overpayment of Veteran s Benefits
☐ 160 Stockholder s Suits
☐ 190 Other Contracts
☐ 195 All Other Real Property

TORTS

PERSONL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault Libel & Slander
☐ 330 Federal Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury

PERSONAL INJURY
☐ 362 Personal Injury - Med Malpractice
☐ 365 Personal Injury Product Liability
☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
☐ 610 Agriculture
☐ 620 Other Food & Drug
☐ 625 Drug Related Seizure of Property 21 USC 881
☐ 630 Liquor Laws
☐ 640 R R & Truck
☐ 650 Airline Regs
☐ 660 Occupational Safety/Health
☐ 690 Other

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

OTHER STATUTES
☐ 400 State Reapportionment
☐ 410 Antitrust
☐ 430 Banks & Banking
☐ 450 Commerce/ICC Rates/etc
☐ 460 Deportation
☒ 470 Racketeer Influenced and Corrupt Organizations
☐ 810 Selective Service
☐ 850 Securities/Commodities/ Exchange
☐ 875 Customer Challenge 12 USC 3410
☐ 891 Agricultural Acts
☐ 892 Economic Stabilization Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act
☐ 895 Freedom of Information Act
☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 950 Constitutionality of State Statutes
☐ 890 Other Statutory Actions

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

CIVIL RIGHTS
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/ Accommodation
☐ 444 Welfare
☐ Other Civil Rights

PRISONER PETITIONS
☐ 510 Motion to Vacate Sentence Habeas Corpus
☐ 530 General
☐ 535 Death Penalty
☐ 540 Mandamus & Other
☐ 550 Civil Rights

VI CAUSE OF ACTION (CITE THE CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BREIF STATEMENT OF CAUSE *DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY*)

18 U S C 1961 (RICO), conspiracy to promote fraudulent tax shelter

VII. REQUESTED IN COMPLAINT:
☐ Check if this is a **CLASS ACTION** Under F R C P 23
DEMAND $6+ Million
JURY DEMAND ☒ YES ☐ NO
CHECK YES only if demanded in compliant

VIII. RELATED CASE(S) (See Instructions)
IF ANY JUDGE ____ DOCKET NUMBER ____

DATE
June 6, 2003

SIGNATURE OF ATTORNEY OF RECORD
Don Paul Badgley

FOR OFFICE USE PNLY

RECEIPT # ____ AMOUNT ____ APPLYING IFP ____ JUDGE ____ MAG JUDGE ____